No. 12,844

IN THE

United States Court of Appeals

For the Ninth Circuit

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY (a corporation),
Appellant,

vs.

H. V. CARTER CO., INC. (a corporation),
Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

BRIEF FOR APPELLANT.

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JURISDICTION.

This cause was commenced on February 13, 1947, in the Superior Court of the State of California in and for the City and County of San Francisco to recover damages for an alleged breach of contract for failure to fill orders for a quantity of garden tractors and also damages resulting from expenses allegedly incurred by plaintiff in the remodelling of its premises, the amount for which judgment was demanded being $24,160, exclusive of interest and costs. (R. 3 to 13.)

On March 17, 1947, a petition for removal of this cause was filed in said Supreior Court and an order for removal was entered by said Superior Court (R. 13 to 18), that being within the time allowed by Title 28 U.S.C.A. Section 72, inasmuch as that was at or before the time the defendants were required by Section 407 of the Code of Civil Procedure of California to answer or plead to the complaint of plaintiff. Thereafter, on April 15, 1947, the defendants filed in the District Court of the United States for the Northern District of California, Southern Division, a certified copy of the record in such suit commenced in such Superior Court. (R. 19 and 20.)

This cause was removed to the District Court for the Northern District of California, Southern Division, by defendants Gravely Motor Plow and Cultivator Company and Gravely-Pacific, Inc., both nonresidents of California, pursuant to Title 28 U.S.C.A. Section 71, this being a suit of a civil nature at law, of which the District Courts of the United States were given jurisdiction. (R. 3 to 13.) The District Court for the Northern District of California, Southern Division, had jurisdiction of this cause by reason of Title 28 U.S.C.A. Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds exclusive of interest and costs the sum of $3,000, and is between citizens of different states, the defendants being citizens of West Virginia and the plaintiff of California. (R. 3 and 4.) There are no other parties, the action having been dismissed as to Gravely Motor Plow and Tractor Co., Inc. Upon the

repeal of Section 41(1) the District Court has jurisdiction by reason of Title 28 U.S.C.A. Section 1332, because of diversity of citizenship.

A judgment was entered in this cause by the District Court in favor of plaintiff and against defendant Gravely Motor Plow and Cultivator Company on March 21, 1950, for $10,980, together with interest and costs. (R. 76 and 77.)

The orders of the District Court amounting to final decision, were entered on October 18, 1950. (R. 83 and 84.) This appeal was taken pursuant to Title 28 U.S.C.A. Sections 1291 and 1294(1). The notice of appeal and cost bond on appeal were filed November 14, 1950. (R. 80 to 82.)

STATEMENT OF THE CASE.

This is an appeal by appellant Gravely Motor Plow and Cultivator Company from a judgment for appellee H. V. Carter Co., Inc. in an action for damages for failure to fill orders for 122 so-called garden tractors manufactured by appellant.

For the purpose of convenience in this brief, appellee H. V. Carter Co., Inc. will be referred to as "Carter", appellant Gravely Motor Plow and Cultivator Company will be referred to as "Gravely", and defendant below Gravely-Pacific, Inc. will be referred to as "Pacific".

Upon removal of this cause to the District Court, a motion to quash service of summons on appellant

Gravely was duly made, the motion being predicated on the ground that Gravely was not doing business in the State of California. This motion was denied. (R. 52.)

At the commencement of the trial and at the conclusion thereof, the motion to quash service of summons on Gravely was again urged. Gravely's answer also raised this issue. (R. 56.) The trial Court entertained the motion on both occasions deferring judgment, however, until the case was finally submitted on briefs. Judgment was rendered quashing service of summons on and dismissing the action as to Gravely and was also rendered in favor of its co-defendant below, Pacific. (R. 64, 65.)

On Carter's motion for a new trial and to alter or amend judgment, the trial court annulled its previous judgment on the ground that it was not within the court's province to review the order of the judge of coordinate jurisdiction who originally denied the motion to quash service on Gravely and that the ruling of this judge of coordinate jurisdiction had become the law of the case. Judgment was thereupon finally rendered by the trial court against Gravely and in favor of Pacific, from which judgment this appeal has been taken. (R. 76, 77.)

Both Gravely and Pacific are corporations organized under the laws of the State of West Virginia. Pacific, at the time of the filing of the action and the service of summons was qualified to do and was doing business within the State of California. The

manager in California of Pacific was John W. Heinen who was designated as a person upon whom process might be served. (R. 149.) At the time the action was filed and summons served on Heinen for the purpose of attempting to obtain jurisdiction of both Gravely and Pacific, Gravely was not qualified to do and was not doing business within the State of California, nor was Heinen then or at any time an officer, agent or representative of, Gravely. (R. 24, 26.)

It was admitted that during a period of 21 years, 1925 to August 1946, Carter and its predecessor were dealers of Gravely products in northern California and portions of central California. During this period of 21 years, on two occasions Carter operated as a dealer of Gravely products under written contracts conferring exclusive sales privileges, but during the years 1943 to 1946, Carter was a non-exclusive dealer of Gravely products. (R. 108, 109.)

In 1945, Pacific was incorporated and Heinen became the manager in California of this corporation, which was thereafter to be the distributor of Gravely products in the western states. It was admitted that a majority of the stock in Pacific is owned by Gravely and that in some instances officers of Gravely are also officers of Pacific. Gravely maintains its principal office at Dunbar, West Virginia, and Pacific maintains its principal office at South Charleston, West Virginia, and a place of business in Los Angeles, California. Each corporation employs separate personnel, the books of account and other records of each

corporation are kept at their respective offices, and each corporation has separate auditors. (R. 38, 39, 238.) Each corporation has separate capitalization, issues separate financial statements and files separate income tax returns. (R. 243.)

Gravely manufactures the tractors, while Pacific is solely a distributing outlet purchasing Gravely products, pursuant to a written contract on terms net cash in 30 days with payments for all purchases, whether equipment or parts, being made by Pacific by its check or checks payable to Gravely. (R. 42-48.) All offers of Pacific to purchase are accepted by Gravely in Dunbar, West Virginia, and shipments are made by Gravely to Pacific via freight, truck, express or parcel post in interstate commerce. The supply of parts maintained by Pacific in California is solely owned by it and held for sale to the trade along with service and repair facilities which are also offered to the trade at a profit to Pacific. (R. 155.)

Twenty other corporations similar to Pacific were organized for selling, distributing and serving Gravely products throughout the United States, the controlling stock of all of which corporations is owned by Gravely. (R. 161.)

The unfilled orders of Carter, with the exception of the order for 45 tractors placed in July 1946, were submitted during the period of the war, to-wit, in the years 1943 to 1945, inclusive. During these years Gravely was operating under War Production Board Regulations restricting the production of its products,

and it was also subject to government rationing and priority ratings.

The 122 tractors, orders for which are the subject matter of this action, can be broken down as follows: 29 thereof were Gravely Model D tractors (Exhibit "FF"), and the remaining 93 were Gravely Model L tractors. This breakdown further shows that 75 of the 122 tractors were included in two large group orders, the first thereof dated June 28, 1943, being for 30 tractors (Exhibit "FF"), and the second thereof being the one of July 3, 1946, for 45 tractors. (Exhibit "X".) The remaining 47 tractors were covered by individual orders which were placed by Carter during the war years 1943 to 1945, inclusive, many of which specified the name and address of the ultimate purchaser. (Exhibit "HH".)

The group order for 30 tractors placed by Carter on June 28, 1943, included 25 Model D and 5 Model L. Gravely acknowledged receipt of this order on July 1, 1943 as follows:

> "There is nothing expected that will make the conditions of selling much different from what it was this year. We do know we will be allowed to sell on priority ratings, but this must be an AA-4 or higher. * * *
>
> "*But, at any rate, we would appreciate the order and will hold it until such a time we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment,* but I would like to offer for your suggestion that both of us keep in mind of shipping you a full carload of tractors for possibly late this year. This would

save us both considerable expense." (Emphasis added.) (Exhibit "FF" reverse side.)

In addition to the 25 Model D tractors covered by this order, 4 of the individual orders were for Model D tractors. The manufacture of Model D tractors in America by Gravely was discontinued in 1942, and thereafter this model was manufactured only in England. Since the end of the war, Gravely had received only a total of 25 Model D tractors of which 3 were delivered to Pacific. (R. 214 to 216.)

In connection with the individual orders for 47 tractors placed by Carter, Gravely's acknowledgment was in the form of a mimeographed letter sent to such ultimate purchasers whose names had been supplied by Carter and which letter set forth conditions in connection with the placing of the orders, some of which were as follows:

"1. Due to Government restrictions, we cannot guarantee delivery of the equipment on your order. * * *

3. The order is placed with the understanding that we will fill it as quickly as possible. We cannot recognize any promised or implied time of delivery. * * *

There are as many factors over which we have no control, that it is impossible for us to predict a delivery date." (Exhibit "II", page 2.)

On cross-examination, Carter's president and general manager, admitted familiarity with the mimeo-

graphed form of acknowledgment sent to these ultimate purchasers by Gravely, and further admitted that their names were supplied by Carter in order that Gravely might send this acknowledgment to them. (R. 135, 136.)

It was undisputed that there was no acknowledgment whatsoever by either Gravely or Pacific of the large group order for 45 Model L tractors sent by Carter on July 3, 1946. (Exhibit X.) This order was sent to Pacific accompanied by a proposed agency contract which was signed by Carter but which was never executed by Pacific, a copy of the order being also sent to Gravely.

After entry of the final judgment, Gravely and Pacific filed a motion to alter, amend and make additional findings of fact and conclusions of law and to amend the final judgment accordingly, which motion was denied in its entirety. (R. 78, 79, 83.) Carter filed its motion to amend the final findings of fact by making an additional finding of fact to the effect that Gravely was at the time of the commencement of the action and the issuance of process therein, and had been prior thereto, doing business within the State of California, which motion was also denied. (R. 83, 84.)

The questions involved in this case are first, was Gravely doing business within the State of California at the time process was served on Heinen, and second, were the orders for the 122 tractors placed by Carter accepted by Gravely.

SPECIFICATIONS OF ERRORS.

Appellant Gravely relies upon the following specification of errors:

1. The trial court and the judge of coordinate jurisdiction each erred in denying the motion to quash service of summons on Gravely.

2. The trial court erred

(a) In finding "That plaintiff was not at any time a dealer or agent of 'Pacific'." (R. 73.) Such finding is clearly erroneous and is unsupported by the evidence, since from and after the month of July 1945, Carter was a non-exclusive dealer of Pacific from whom it received tractors and with whom it was seeking to enter into an exclusive dealer's contract. (R. 109, 140, 141, Exh. XX.)

(b) In finding "That at all of the times the orders for 122 tractors, the subject matter of this action, were forwarded to 'Gravely', the plaintiff was a non-exclusive dealer in 'Gravely' products and continued as such dealer until August 23, 1946". (R. 73.) Such finding is clearly erroneous and is unsupported by the evidence since Carter received tractors from Pacific and also submitted to Pacific on July 3, 1946, its order for 45 tractors. (R. 141, Exh. X.)

(c) In finding "That the said orders for 122 tractors were placed by plaintiff with defendant 'Gravely' between the beginning of World War II and August 23, 1946". (R. 73, 74.) Such finding is clearly erroneous and is unsupported by the evidence

since Carter submitted to Pacific on July 3, 1946 its order for 45 tractors. (Exh. X.)

(d) In finding "That the said orders for 122 tractors were accepted by 'Gravely' with the qualifications that deliveries would be made as soon as conditions created by the War would permit". (R. 74.) Such finding is clearly erroneous and is unsupported by the evidence since there was never any unqualified or unequivocal acceptance by Gravely of any of the orders for 122 tractors. The evidence shows that the acknowledgment by Gravely of the orders for 47 tractors for ultimate purchasers was with definite qualifications (Exh. II), and similarly the acknowledgment of the group order for 30 tractors on June 28, 1943 was definitely qualified. The evidence is undisputed that the order for 45 tractors on July 3, 1946 submitted to Pacific with a copy to Gravely was not acknowledged in any manner by Pacific or Gravely.

(e) In finding "That all of said orders for 122 tractors were for 'ultimate purchasers', persons who had agreed to purchase the tractors from the plaintiff". (R. 74.) Such finding is clearly erroneous and is unsupported by the evidence since 75 of the 122 tractors were covered by the group orders of June 28, 1943 and July 3, 1946. (Exh. FF, X.)

(f) In finding "That after restrictions occasioned by the War were alleviated or removed, 'Gravely' in the years 1945, 1946 and 1947, shipped to 'Pacific', its California distributor, more than 122 tractors". (R. 74, 75.) Such finding is clearly erroneous and is un-

supported by the evidence as it is undisputed that after its incorporation Pacific was the distributor of Gravely products originally in five western states and subsequently in four of these states.

(g) In finding "That all of said orders for 122 tractors were orders placed with plaintiff by the 'ultimate purchasers' and forwarded by plaintiff to defendant 'Gravely' ". (R. 75.) Such finding is clearly erroneous and is unsupported by the evidence since 75 of the 122 tractors were covered by the group orders of June 28, 1943 and July 3, 1946. (Exh. FF, X.)

3. The findings of fact and conclusions of law are insufficient to support the judgment since the trial court failed and refused to find that Gravely was, at the time of the commencement of the action and the issuance of process therein and had been prior thereto, doing business within the State of California. (R. 83, 84.)

4. That the judgment of the trial court is contrary to and unsupported by law.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. The attempt to obtain jurisdiction of Gravely by service of process on Heinen, the manager of Pacific, was entirely ineffectual since Heinen was not then or at any time an officer, or general manager of Gravely, and Gravely was not qualified to do nor was it doing business within the State of California.

2. The acknowledgments by Gravely of receipt from Carter of the orders for 47 tractors for ultimate purchasers and the group order of June 28, 1943 for 30 tractors, were definitely qualified and equivocal, and therefore there was no acceptance of these orders such as the law requires in order to constitute a binding contract.

3. There is no evidence whatsoever of any acknowledgment by either Gravely or Pacific of the group order for 45 tractors sent by Carter on July 3, 1946. Therefore one of the essentials required by the law before a contractual obligation arises, that of acceptance of the offer, is entirely lacking with respect to this order.

I. JURISDICTION OF GRAVELY WAS NOT OBTAINED BY SERVICE OF PROCESS ON THE MANAGER OF ITS SUBSIDIARY, PACIFIC.

Jurisdiction over Gravely, a West Virginia corporation, was purportedly obtained by service of process upon John W. Heinen, an employee of Pacific. Pacific, a corporate subsidiary of Gravely, is also a West Virginia corporation and Heinen is employed as its manager in California having no connection whatsoever with Gravely.

Heinen was designated by Pacific as its agent for service of process but it is undisputed that he was not so designated by Gravely. No contention is made that Heinen is the "president or other head of the corporation, a vice president, a secretary, an assist-

ant secretary, or the general manager'' of Gravely,—those persons upon whom process may be served in order to obtain jurisdiction of a foreign corporation under the provisions of Section 6500 of the Corporations Code of California.

Also, if as Carter asserts, Gravely was doing business in California without having qualified to do so then the applicable statute would be Section 6501 of the Corporations Code of the State of California. That statute provides:

> ''If the agent for the service of process designated cannot be found with due diligence at the address given, or if the agent designated is no longer authorized to act, or if no person has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by delivery to the Secretary of State or to an assistant or deputy secretary of state * * *''

Carter made no attempt to comply with this statute.

Elementary principles of law conclusively demonstrate that prior to the incorporation of Pacific in 1945, Gravely was not doing business in this State merely because it sold its products to Carter and other distributors. It is basic law that an offer to purchase made by Carter in California and forwarded to West Virginia for acceptance is simply a transaction in interstate commerce. It is submitted, however, that it

is immaterial whether or not Gravely was doing business in California prior to the incorporation of Pacific. In order to confer jurisdiction, Carter must establish that Gravely was doing business in California at the time of the service of process. *Jameson v. Simonds Saw Co.* (1906), 2 Cal. App. 582, 84 Pac. 289.

Gravely does not deny that the promotive efforts of the subsidiary in California were of benefit to the parent. It must be pointed out, however, that such benefit was merely incidental to the main benefit secured by the subsidiary. Every business transaction has its primary and its incidental benefits, even though the parties to such transactions are completely separate entities. The fact that Pacific was authorized to obtain dealers in California and that it terminated the relationship between Carter and Gravely lends no strength to Carter's position. In so doing Pacific was merely fulfilling its designated duties as a subsidiary of Gravely.

The distinguishable functions of Pacific and Gravely are aptly characterized in *Irvine Co. v. McColgan* (1945), 26 Cal. (2d) 160, 157 Pac. (2d) 847, where, at page 165, the court says:

> "Transactions engaged in *for* a foreign corporation in a state are not necessarily engaged in *by* the corporation in that state."

As the court said in *Philadelphia and Reading Railroad v. McKibbin* (1917), 243 U.S. 264 at page 265, 61 L. Ed. 710 at page 711:

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the State the process will be valid only if served upon some authorized agent."

Certainly it cannot be held that Gravely was "present and doing business" in California merely because Pacific engaged in transactions *for* Gravely, nor can it be held that the service of process on Heinen was valid.

In *Matrozos v. Gulf Oil Corp.* (1943), 54 F. Supp. 714, the court reviews a factual situation analogous to the instant case. Therein service of process was made on an employee of Gulf Oil, who was designated as Gulf's agent for service of process in an attempt to acquire jurisdiction over a foreign subsidiary of Gulf Oil. The court, in quashing service of process, said, at page 715:

> "It is the contention of the movant that the Gulf Oil Corporation was not its general agent but had authority to act only in limited matters upon specific request, and that it had no authority to accept service of process for the subsidiary.
>
> "The questions involved seem to be two in number.
>
> "Even if the Gulf Oil Corporation could be proved to stand in such a position to the moving respondent that service could validly be made

upon the former for the latter, was Greene possessed of such authority (expressly or by implication) that service upon him as a Gulf employee constituted service upon the Mene Grande Oil Company, C.A.?

"It is my opinion that he was not. He does not appear to be 'an officer, a managing agent or general agent' of either respondent, and although he was an agent authorized by appointment to receive service for Gulf Oil Corporation, it is not shown that he was so appointed for the Mene Grande Oil Company, C.A. In fact, the contrary appears.

"Since Green had only limited authority to act, the libelant was powerless to enlarge the agency. On that ground alone, the present motion should be granted. (Citing cases.)"

In the case at bar, Carter seeks to "enlarge" the agency of Heinen. This it cannot do. As the court said in *Favell Utley Realty Co. v. Harbor Plywood Co.* (1950), 94 F. Supp. 96 at page 97, "The first question before this court is one of state law." In the instant case, Carter did not comply with the State law, which would necessarily have been the first step in acquiring jurisdiction over Gravely, and it is submitted that the attempt to acquire jurisdiction over Gravely by service on an employee of Gravely's corporate subsidiary was completely ineffectual.

It is fundamental law that service upon a corporation's subsidiary is not service upon the parent corporation. This principle was enunciated by the United States Supreme Court in the case of *Cannon Manu-*

facturing Co. v. Cudahy Packing Co. (1924), 267 U.S. 33, 45 S.Ct. 250, 69 L. Ed. 634, and has been reiterated by every well-considered case to date. In *Amtorg Trading Corp. v. Standard Oil Co. of Calif.* (1942), 47 Fed. Supp. 466, the court held that the doing of business by a foreign corporation through a subsidiary does not constitute a "doing of business" within the state, so as to make the foreign corporation amenable to process of the state, and that the service of process upon an officer of the subsidiary was not service upon the parent corporation. See also *Echeverry v. Kellogg Switchboard & Supply Co.* (1949), 175 Fed. (2d) 900; *Favell Utley Realty Co. v. Harbor Plywood Co.,* supra (D.C. Ninth Circuit).

Those few cases in which the parent and subsidiary arrangement have been disregarded are not accorded much weight, and in this connection it is interesting to note the comment on *Industrial Reserve Corp. v. Gen. Motors Corp.* (1928), 29 Fed. (2d) 623, in Ballantine on Corporations, Rev. Ed. 1946, at page 325:

> "* * * this case which ignores the corporate entity of the subsidiaries for purposes of jurisdiction and service of process upon the parent on a liberal instrumentality theory, is of very doubtful soundness and authority and is difficult to reconcile with decisions of the United States Supreme Court and other federal courts." (Citing *Cannon v. Cudahy,* supra, and other authorities.)

The *Cannon* case involves facts almost identical with the case at bar. Therein the defendant Cudahy, a Maine corporation, established a subsidiary corpo-

ration, the Cudahy Packing Company of Alabama, to market its products within the State of North Carolina. Process was served upon the process agent of the subsidiary and the plaintiff undertook to establish identity between the defendant, the Maine corporation, and its subsidiary, the Alabama corporation. The facts reveal that the subsidiary bought from the defendant and sold to dealers. Goods packed by the defendant in Iowa were shipped direct to dealers and the subsidiary corporation collected the price. Through ownership of the entire capital stock and otherwise, the parent corporation dominated the Alabama corporation completely and exerted its control in substantially the same way, and through the same officers, as it did over those selling branches or departments of its business not separately incorporated which were established to market the Cudahy products in other states. The Supreme Court, commenting upon the recited facts, remarked at page 335 (U.S.) and page 641 (L. Ed):

> *"The existence of the Alabama corporation as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations."* (Emphasis added.)

The court then goes on to raise the question as to whether or not this corporate separation, carefully maintained, must be ignored in determining the existence of jurisdiction. Answering this question in the

negative, the court said at page 336 (U.S.) and page 642 (L. Ed.):

> "The defendant wanted to have business transactions with persons resident in North Carolina, but, for reasons satisfactory to itself, did not choose to enter the state in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. Bank of America v. Whitney Cent. Nat. Bank, supra. It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one state shall be amenable to suit in the Federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein. Compare Lumiere v. Mae Edna Wilder, 261 U.S. 174, 177, 178, 67 L. Ed. 596, 600-602, 43 Sup. Ct. Rep. 312. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by Conley v. Mathieson Alkali Works, 190 U.S. 406, 409-411, 47 L. Ed. 1113, 1115, 1116, 23 Sup. Ct. Rep. 728; Peterson v. Chicago, R.I. & P.R. Co., 205 U.S. 364, 51 L. Ed. 841, 27 Sup. Ct. Rep. 513; and People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87, 62 L. Ed. 587, 590, 38 Sup. Ct. Rep. 233, Ann. Cas. 1918C, 537. In the case at bar, the identity of interest may have been more complete, and the exercise of control over the subsidiary more intimate, than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction."

If the facts of the *Cannon* case and those of the case at bar differ, then such difference serves to emphasize to a greater degree the separate nature of Gravely and Pacific.

The evidence produced at the trial as well as the affidavits in support of the motion to set aside the service of summons on Gravely delineate facts of great importance on the jurisdictional aspects of this case. A review of those facts in the light of the *Cannon* case, supra, impels the obvious conclusion that Gravely and Pacific are separate entities. Admittedly, Gravely owns a majority of stock in Pacific and in some instances officers of Gravely are also officers of Pacific. However, the evidence on the manner and mode of internal operation of each corporation clearly establishes the separate and completely independent existence of parent and subsidiary.

Pacific maintains its office in South Charleston, West Virginia, and Gravely maintains its office at Dunbar, West Virginia. Each corporation employs separate personnel, the books of account and other records of each corporation are kept at their respective offices, and each corporation has separate auditors. Each corporation has separate capitalization, issues separate financial statements, and each corporation files a separate income tax return. (R. 38, 39, 238, 243.)

Gravely is concerned with the manufacture of tractors, while Pacific is solely a distributing outlet and was incorporated together with twenty similar subsidiaries in accordance with a nationwide plan for

obtaining proper representation and distribution of Gravely's products. (R. 161.) Gravely at no time transacted business in California, in the jurisdictional sense. Pacific, on the other hand, since its incorporation in 1945 has been doing business in California and has designated an agent for the service of process in this State. Pacific purchases Gravely's products on a basis of terms net cash in thirty days, and payments for all purchases, whether equipment or parts, are made by Pacific by its check or checks payable to Gravely. All offers of Pacific to purchase are accepted by Gravely in Dunbar, West Virginia, and shipments are made by Gravely to Pacific via freight, truck, express or parcel post in interstate commerce. Any supply of parts maintained by Pacific in this State is owned by Pacific and held for sale to the trade, along with service and repair facilities which are also offered to the trade at a profit to Pacific. (R. 155.)

While there is admittedly a close connection and frequent communication between Gravely and Pacific, it is submitted that such communication and related transactions are done in the course of legitimate interstate commerce and in keeping with established principles of corporate law governing parent and subsidiary corporations. Certainly, the facts of the case at bar demonstrate the *"corporate separation, carefully maintained"* described in the *Cannon* case, supra.

In *Crane v. Gravely Motor Plow and Cultivator Company* (1947), 69 N.Y. Supp. (2d) 175, Gravely,

the same defendant sued herein, was involved in litigation in the State of New York. The New York Supreme Court (Appellate Division) held the fact the corporation doing business in the State was a foreign corporation's subsidiary (performing the same function as Pacific in the instant case) and was engaged in the business of purchasing and reselling the foreign corporation's products, did not make the subsidiary the foreign corporation's agent on which summons could be served in an action against the foreign corporation. In this case, the New York Supreme Court (Appellate Division) was considering the identical jurisdictional facts that are presented in the case at bar.

The courts, in examining the factors which make the subsidiary the agent of the parent corporation for service of process, have scrutinized a variety of situations and have held that mere combination of insufficient factors does not change the result—the parent corporation is still not doing business within the state. *Oyler v. J. P. Seeburg Corp.* (1939), 29 Fed. Supp. 927.

LaVarre v. International Paper Co. (1929), 37 Fed. (2d) 141, clearly sets forth the rule of law relative to the ownership of the subsidiaries stock by the parent corporation, the court saying at page 145:

> "It is well settled that ownership of stock in a subsidiary which is doing business within a state does not bring the company owning or controlling the stock within the state in the sense of 'transacting business' therein, and does not subject the

parent company to local jurisdiction for the purpose of service of process upon it. (Citing cases.) In these cases the Supreme Court of the United States has clearly and definitely held that the fact that what is popularly known as a subsidiary corporation is doing business in the state is not sufficient to bring the parent corporation therein for the purpose of service of process upon it. (Citing cases.)

"For example, the court in People's Tobacco Company v. American Tobacco Company, supra, speaking through Mr. Justice Day, says: 'The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there.'

"And, again, in Philadelphia & Reading R. R. Co. v. McKibbin, supra, where Mr. Justice Brandeis says: 'Nor would the fact, if established by competent evidence, that "subsidiary companies" did business within the state, warrant a finding that the defendant did business there.'

"In the Whitney bank case, supra, the court said: 'The jurisdiction taken of foreign corporations, * * * does not rest upon a fiction of constructive presence * * * It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established.'

* * * * * * *

"For example, in Peterson v. Chicago, Rock Island & Pacific R. R. Co., supra, the undisputed facts showed that from a practical standpoint the

relationship between the parent corporation and the subsidiary was practically identical, yet the Supreme Court held that such intercorporate relationship was insufficient to make the two corporations one for purpose of service of process.

* * * * * * *

"It will serve no useful purpose to consider in detail all the many cases decided by the Supreme Court of the United States of this question. In all these cases, the identity of organization between subsidiary and parent corporation was more or less complete, and yet the court refused to disregard the established rule regarding corporate entity."

The law, as stated in *Jameson v. Simonds Saw Co.*, supra, which has never been challenged, placed upon Carter the burden of proving that Gravely was "doing business" within the state. Complete failure of Carter to meet this burden of proof imposed on it is disclosed by the evidence in this case.

The rule determining whether or not jurisdiction exists as to Gravely is that set forth by the Supreme Court of the United States in the leading case of *Cannon v. Cudahy,* supra, and applying this authority to the case at bar leads to the inescapable conclusion that the attempt to obtain jurisdiction of Gravely by service of process on the manager of its subsidiary, Pacific, is entirely ineffectual.

II. THERE WAS NO ACCEPTANCE BY GRAVELY OF THE ORDERS BY CARTER FOR THE 122 TRACTORS.

A. The acknowledgments by Gravely of the orders for 77 tractors were qualified and equivocal.

The principal question in this case apart from the issue of jurisdiction of Gravely is, was there a binding contract between Carter and Gravely for the sale of 122 tractors.

Elementary principles of law require that the existence of such a contract presupposes that there must be an offer by Carter and an acceptance by Gravely, and the authorities hereinafter cited will show that such acceptance must be unequivocal and unqualified in order to constitute a binding contract.

The mimeographed acknowledgment (Exhibit II) sent by Gravely to the ultimate purchasers, whose names were furnished with certain of the 47 individual orders and with which Graves admitted familiarity, was certainly equivocal and qualified. These ultimate purchasers and Carter were told by Gravely that the orders would be filled as quickly as possible but that no promised or implied time of delivery could be recognized nor could delivery be guaranteed due to governmental restrictions. This, we submit, does no more than inform the ultimate purchasers and Carter that the orders would receive Gravely's best attention.

Certainly during the period of the war no one could forecast definitely its duration or outcome and Gravely could not foretell the continuation of governmental restrictions or type thereof that would be imposed on

it during the war and the post war period. Gravely could not, therefore, accept orders from its dealers without imposing the foregoing qualifications made necessary because of circumstances beyond its control.

It is a matter of common knowledge that during the war years, consumers of articles, of which supply was limited and far exceeded by the demand, such as Gravely products and automobiles, would place orders with any number of different dealers in hopes of receiving the desired goods. This was the reason that Gravely repeatedly, after the termination of the war, requested Carter and its other dealers to "screen" and verify the authenticity of the backlog of orders because when restrictions were removed it would be a physical impossibility to fill all orders placed with Gravely by its dealers. (R. 115, 203, 250.) Gravely was seeking to ascertain from its dealers information with respect to the authenticity of the war-time orders which had been qualifiedly accepted in order that it might allocate tractors to them as production increased. (R. 202, 203.) Carter was advised by bulletins and by both Gravely's president and Heinen that "Buy in Advance" orders and orders with deposits would be filled first as the output permitted. Nevertheless it is admitted that Carter did not sell any "Buy in Advance" orders nor did they obtain any deposits on the old orders in accordance with the many requests of Gravely and Pacific. (R. 112, 203.)

The rule of law with respect to the requirement of a binding acceptance in order to create a contractual obligation is set forth in Restatement of the Law of Contracts, Section 58, as follows:

> "Acceptance must be unequivocal in order to create a contract.
>
> Comment: a. An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.
>
> Illustration: 1. A sends an order for goods to B. B replies that the order will receive his attention. There is no contract."

In the early decision of *Mahar v. Compton* (1897), 45 N.Y. Supp. 1126 at 1128, the Supreme Court of New York stated the rule as follows:

> "It is well settled, however, that, in order to establish a legal contract through the medium of correspondence, it must be made to appear that there was, not only a plain, unequivocal offer, but that the acceptance of such an offer was equally plain and free from ambiguity. In other words, there must have been an exact meeting of the minds of the contracting parties in respect to every detail of the proposed contract; and if the precise thing offered was not accepted, or if the acceptance was in any manner qualified by conditions or reservations, however slight they may have been, the universal rule seems to be that no valid contract is thereby established, but that such a modified or qualified acceptance must rather be treated as a rejection of the offer." (Citing authorities.)

To the same effect: *Howard v. Chow* (1938), 27 C.A. (2d) 775, 81 Pac. (2d) 994; *Bullock v. Harwick* (1947), 158 Fla. 834, 30 So. (2d) 539; *Jahn & Co. v. McClaine* (1917), 97 Wash. 95, 165 Pac. 1060.

The courts have uniformly held that the acknowledgment of an offer which states it will receive prompt attention or best attention does not constitute an acceptance of the offer.

In *Davis v. McClure* (1927), 123 Kan. 454, 255 Pac. 1116, 1117, the court said:

> "Acknowledgment of the receipt of an order and statement that 'the same shall have prompt attention, or prompt and careful attention,' has been held not to have been an acceptance of the order. (Citing authorities.)"

In *Davis & Co. v. Moultrie Cotton Mills* (1934), 48 Ga. A. 577, 173 S.E. 448, the court said:

> "A letter, acknowledging the receipt of an order for the purchase of merchandise, which contains the statement that 'this will have our best attention', does not amount to an acceptance of the offer contained in the order, and there is not thereby created a contract of sale. (Citing authorities.)"

In *Bowser & Co. v. Crescent Filling Station* (1925), 133 S.C. 281, 130 S.E. 870, the offeree by postcard acknowledged the receipt of an order and informed the offeror it had been given a certain number and would receive prompt attention but no express acceptance of the order was communicated to the offeror. At page 871 (130 S.E. 870) the court said:

"The defendant's written order was a mere proposal and not a contract until accepted by the plaintiff. (Citing authorities.) When did this written order, by virtue of the plaintiff's acceptance, ripen into such a contract as could have been enforced by the defendant? The postcard acknowledgment by mail of the receipt of the order was not, we think, such binding acceptance."

In *Armor Insulating Co. v. National Gypsum Co.* (1944), 71 Ga. A. 672, 31 S.E. (2d) 889, the offeree acknowledged the offer as follows:

"This order is under consideration in our office at the present time, and we believe the best procedure will be to enter it with the Portsmith plant so that they can begin to make definite arrangements for fabrication. * * * The last paragraph of your kind letter is being checked with our production department in an effort to determine what program can be worked out on an order of this kind. * * *"

At page 884 (31 S.E. (2d) 880) the court said:

"The defendant in error (Gypsum) contends that Armor's order of November 7, 1940, for Travacoustic tile was never approved and accepted, and that no binding contract in this respect was ever made between the parties. We are of the opinion that the defendant in error is correct in its contentions. The placing of the order by Armor and the acknowledgment of the receipt thereof by Gypsum did not constitute a valid contract. It was ruled in Evans v. Atlanta Paper Co., 21 Ga. App. 114, 117, 93 S.E. 1023, 1024, 'The mere acknowledgment of the receipt of an order, even though coupled with the assurance that the same

should receive prompt attention, is not sufficient to show acceptance of the offer. The reason for this ruling is ably given in the case of Manier v. Appling, 112 Ala. 663, 20 So. 978, where the Supreme Court of Alabama held that: "Acceptance by a wholesale merchant of an order for the purchase of goods is not shown by evidence that the merchant wrote to the buyer, acknowledging receipt of the order and stating that it should have prompt attention." * * * In Cheboygan Paper Co. v. Swigart Paper Co., 140 Ill. App. 314, *it was held that an acknowledgment of the receipt of an order, saying that the same had gone forward to the mill for their attention and would be filled as quickly as the orders now placed with the mill were out of the way, was not such an unconditional acceptance as to constitute a complete contract.*" (Emphasis added.)

See also:

Courtney Shoe Co. v. Curd & Son (1911), 142 Ky. 219, 134 S.W. 146.

The only evidence of an acknowledgment by Gravely of the order for the 30 tractors placed by Carter on June 28, 1943 was the letter from Gravely on July 1, 1943. (Exhibit "FF".) In this acknowledgment Gravely's president stated, "But, at any rate, we would appreciate the order and will hold it until such a time we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment * * *" Any contention that this letter of acknowledgment constitutes an unqualified acceptance of the order such as the law requires before

a contractual obligation arises is neither in agreement with the law or the undisputed evidence.

A decision directly in point with the circumstances in connection with this particular order is *Fenn v. American Rattan & Reed Mfg. Co.* (1921), 75 Ind. A. 146, 130 N.E. 129, in which the offeree acknowledged the offer as follows:

> "We note that you wish us to enter an additional order for three more cars for shipment January, February and March which we are perfectly willing to do, but cannot make promises as to delivery. In fact, if you will let this lie in abeyance until the latter part of January we will be in a better position to advise what we will be able to do for you in reference to this order."

The offeror in this case had filed a cross-complaint based upon the breach of an alleged contract arising from its offer and the foregoing acceptance. A demurrer to the cross-complaint was sustained by the lower court which action was affirmed, the court stating at page 130 (130 N.E. 129):

> "There was no error in sustaining the demurrer to the cross-complaint. The correspondence does not show a contract between the parties. Appellee expressly stated in its letter, answering appellant's letter of December 21, 1915, that if appellants would let the matter lie in abeyance until the latter part of January appellee would be in a better position to advise what it would be able to do with reference to the order. Abeyance is defined by Webster as a condition of being undetermined. It is clear that there was no accept-

ance of the order, nor was there any modification by appellee of the appellant's order, which was afterward accepted by appellants."

See, also:

Armor Insulating Co. v. National Gypsum Co. (supra).

B. There was no acknowledgment by Gravely or Pacific of the order for 45 tractors.

Coming to the last order of Carter for the 45 tractors, which was placed on July 3, 1946, it is undisputed that this order was not acknowledged in any manner whatsoever by either Gravely or Pacific. (R. 138, 139.) In fact any business relationship existing between the parties was terminated by Pacific approximately seven weeks thereafter, on August 23, 1946. (Exh. 3.) Hence in connection with this order, one of the essentials required by the law before a contractual obligation arises, that of acceptance of the offer, is entirely lacking.

In commenting on the necessity of an acceptance before there can be a completed contract, in *Anderson Bros. & Johnson Co. v. Sioux Monument Co.* (1930), 210 Ia. 1226, 232 N.W. 689, 691, the court said:

"The written instruments were not completed contracts. Each was an order which contemplated that it should be accepted or acted upon by the other party.

"We had a similar case before us in McCormick Harvesting Machine Co. v. Richardson, 89 Iowa,

525, 56 N.W. 682, 683, where we reviewed the law in respect to such an order, and said:

" ' "A proposal or offer, therefore, must in some way be accepted to constitute a sale." Benj. Sales (Bennett's Ed. 1892, Amer. Notes), p. 73. It has been held that such a writing does not constitute a contract until accepted or acted upon, and that prior thereto it may be withdrawn. * * *

" 'In the light of these elementary principles and of the cases cited it seems clear that the writing in question does not constitute a contract in the absence of its acceptance, or of any action under it by the party whose duty it is to accept. It does not purport to be a contract between the parties. By it plaintiff was not obligated to do anything on its part. Plaintiff does not undertake, by the terms of the writing, to ship the twine on the proposed conditions. It is merely a request or a proposition from defendant to plaintiff that if the latter will ship certain goods he will pay a certain sum therefor at a fixed time. It may be said to be an order, but it lacks an essential element of a contract,—mutual assent. Being only a request or order, which required acceptance by the plaintiff to give it the force of a contract, it follows that it might be withdrawn or countermanded at any time prior to its being so accepted. We do not say that the acceptance must be a formal one. The acceptance might be shown by proving an act done on the faith of the order, such as the shipment of the goods ordered.'

"We think the written instruments in suit were orders and not completed contracts when signed

> by the appellees. Something more was necessary before there could be a completed contract, namely, acceptance by the other party."

Reliance Bagging Co. v. Electric Gin Co. (1945), 208 Ark. 829, 187 S.W. (2d) 724, is a case in which it was held that an alleged contract failed because of the absence of an acceptance. The court at page 726 (187 S.W. 724) said:

> "It is the law that the mere receipt of an offer to buy imposes no obligation to sell, and acceptance of such an offer is not to be implied from mere silence, on the contrary, failure to accept within a reasonable time implies a rejection of the offer, in which case no obligation rests upon either party."

It is therefore submitted that there is no evidence in this case of any unequivocal or unqualified acceptance of any of the orders for the 122 tractors, hence one of the essential elements before a contractual relationship arises is entirely lacking.

CONCLUSION.

Appellant Gravely respectfully prays that the judgment of the trial court be reversed upon the following grounds:

1. No jurisdiction of Gravely was obtained by service of process on Heinen, the manager of its subsidiary Pacific; and

2. There was no acceptance by Gravely of the orders placed by Carter for the 122 tractors.

Dated, San Francisco, California,
May 25, 1951.

Respectfully submitted,

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